



Commonwealth of Virginia

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GUIDANCE MEMORANDUM

Subject: Civil Enforcement Manual- Chapters 2 through 4 and Chapter 6 (CEM-01, CEM-04, CEM-05, CEM-06, CEM-07, CEM-10, CEM-11, CEM-11A, and CEM-11B)

To: Central Office Enforcement Managers, Regional Enforcement Managers, and Regional Enforcement Specialists (electronic distribution)

From: Tiffany Severs, Director
Division of Enforcement 

Date: January 3, 2022

Copies: Jeffery Steers, James J. Golden, Regional Directors, Division Directors, Central Office Compliance Managers, Angela Jenkins, Melissa Porterfield (electronic distribution)

Summary:

This guidance will delete the Civil Enforcement Manual Introduction and supersedes Chapters 2 through 4 (last updated in November 2016) and Chapter 6 (various portions last updated 1999, 2007, and 2016) of the DEQ Civil Enforcement Manual on Virginia Regulatory Town Hall (ID: 4012, CEM-01, CEM-04, CEM-05, CEM-06, CEM-07, CEM-10, CEM-11, CEM-11A, and CEM-11B). These chapters of the Civil Enforcement Manual covers general compliance and enforcement procedures, the timely and appropriate policy for processing cases, procedures for calculating civil charges, and adversarial administrative proceedings.

Public comment on these updates was accepted from October 25, 2021 through November 24, 2021. This guidance is effective as of January 3, 2022 and shall be applied to enforcement cases

resolving Notices of Alleged Violations issued from that date forward; the newly effective manual shall not be applied to enforcement cases initiating prior to January 3, 2022.

A summary of the changes are as follows:

Chapter 2: General Enforcement Procedures

This chapter provides guidance on the procedures that DEQ staff use to address alleged violations of enforceable environmental requirements, including: (1) notifying responsible parties; (2) referring cases for enforcement action and deciding on a plan for the case; (3) resolving enforcement cases with and without Responsible Party consent; (5) special procedures for underground storage tanks (USTs) and for sanitary sewer overflows (SSOs); (6) monitoring enforcement orders and agreements; and (7) closing enforcement cases. Changes were limited to providing clarification and additional instruction where needed.

Chapter 3: Priority, Timeliness, and Certainty of Enforcement Actions

This chapter describes the enforcement procedures to help ensure an appropriate, timely, and consistent response to alleged noncompliance. Changes were made to clarify case prioritization.

Chapter 4: Civil Charges and Civil Penalties

Civil charges and civil penalties are authorized by the Virginia Code to penalize noncompliance, to serve as an incentive against future noncompliance, and support DEQ's mission "to protect the environment of Virginia in order to promote the health and well-being of the Commonwealth's citizens." This chapter sets out the specific procedure and criteria used by DEQ to calculate civil charges and civil penalties in administrative enforcement actions, including: (1) orders issued by consent; (2) special orders issued after an informal fact finding proceeding; and (3) special orders issued after a formal hearing.

Changes were made to provide clarifications where needed, increase consistency across all media, and inflationary adjustments to all the civil charge worksheets. Substantive changes were made in various water programs to address program experience. Significant instructional and penalty calculation procedures for solid and hazardous waste enforcement actions to align these programs with how penalties are calculated in other media.

Chapter 6: Adversarial Administrative Actions

This chapter addresses how to prepare for and conduct informal fact-finding proceedings, formal hearing and Section 10.1-1186 special order proceedings. It also addresses procedures intended for use by Supreme Court hearing officers conducting formal hearings for DEQ and its three regulatory boards pursuant to Va. Code § 2.2-4020. Although prompted by a legislative directive to develop procedures for formal hearings pursuant to Va. Code §§ 10.1-1309, 10.1-1455, and 62.1-44.15, it is recommended that these Procedures be used for any formal hearing conducted for DEQ.

Changes to this chapter include updates and consolidation of adversarial proceedings procedures that were found in separate guidance documents and covered various aspects of these proceedings. After consolidation, statutory updates and clarifications were made as appropriate.

Electronic Copy:

An electronic copy of this guidance is available on:

- The Virginia Regulatory Town Hall under the Department of Environmental Quality (<http://www.townhall.virginia.gov/L/gdocs.cfm?agencynumber=440>)

Contact Information:

Please contact the appropriate media Central Office Enforcement Manager with any questions regarding the application of this guidance to a specific case.

Certification:

As required by Subsection B of § 2.2-4002.1 of the APA, the agency certifies that this guidance document conforms to the definition of a guidance document in § 2.2-4101 of the Code of Virginia.

Disclaimer:

This document is provided as guidance and, as such, sets forth standard operating procedures for the agency. However, it does not mandate any particular method nor does it prohibit any alternative method. If alternative proposals are made, such proposals should be reviewed and accepted or denied based on their technical adequacy and compliance with appropriate laws and regulations.

Chapter 6

APA Adversarial Proceedings

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Effective: January 3, 2022

Introduction

The Virginia Administrative Process Act (“APA”), Va. Code §§ 2.2-4000 *et seq.*, provides for two types of proceedings that agencies can use to make case decisions.¹ They are: (1) Informal Fact Finding Proceedings (“IFFs”) as provided in Va. Code § 2.2-4019 and (2) Formal Hearings as provided in Va. Code § 2.2-4020. The DEQ statute at Va. Code § 10.1-1186 also provides for the issuance of special orders by the Director of DEQ with penalties up to \$10,000 following an IFF. The media statutes authorize the citizen boards to issue special orders with penalties up to \$100,000 following a formal hearing.²

The following procedures address how to prepare for and conduct these proceedings at DEQ. At all times, the APA must be consulted to ensure full compliance with the APA. In addition, the Regional Offices are to consult with the Central Office Division of Enforcement in pursuing an enforcement action pursuant to the APA.

IFFs and 1186 Special Orders

After a Notice of Alleged Violation (NOAV) is issued, enforcement staff may request an IFF in accordance with § 2.2-4019 of the APA, in order to make a case decision regarding a contested issue. A responsible party may also request that DEQ hold an IFF to determine whether a violation alleged in a notice of alleged violation has occurred.³ Pursuant to Va. Code § 2.2-4020.1, a recipient of a notice of alleged violation may alternatively request a summary case decision on questions of law, where no material facts are in dispute.⁴

The intent of the adversarial IFF is to make a required or necessary case decision⁵ without holding a Formal Hearing and, in some cases, to impose an order requiring a responsible party to take certain

¹ Guidance documents set forth presumptive operating procedures. *See* Va. Code §§ 2.2-4001 and 2.2-4101. Guidance documents do not establish or affect legal rights or obligations, do not establish a binding norm, and are not determinative of the issues addressed. Decisions in individual cases will be made by applying the laws, regulations, and policies of the Commonwealth to case-specific facts.

² Va. Code §§ 10.1-1307, 10.1-1309, 10.1-1455(G), and 62.1-44.15.

³ The Responsible Party may also request Process for Early Dispute Resolution (PEDR) to assist in the resolution of disagreements with DEQ concerning the issuance of notices of alleged violation or notices of deficiency. The requirement for PEDR is found in 2005 Acts c. 706, clause 2 at the end of the Act. It is not codified. [Agency Policy Statement No. 8-2205](#) provides additional guidance on PEDR. The resolution of a dispute provided through PEDR is not a case decision.

⁴ The request for a summary case decision must be in writing, signed on behalf of the requester, and include “1. A statement that no material facts are in dispute; 2. A proposed stipulation of all such undisputed material facts concerning the application or notice; 3. A clear and concise statement of the questions of law to be decided by summary case decision; and 4. A statement that the requestor waives his right to any other administrative proceeding provided in this article by the agency on the questions of law to be decided by summary case decision.” DEQ has 21 day from receipt of the request to determine whether the matter may be decided by summary case decision, and DEQ must notify the requestor of its decision in writing. If DEQ grants a request for summary case decision, the DEQ decisionmaker shall accept briefs on the questions of law at issue and may hear oral arguments. The decision must state the findings, conclusions, reasons, and basis for the decision and be conveyed to the requestor.

⁵ Va. Code § 2.2-4001 defines a “case decision” as “any agency proceeding or determination that, under laws or regulations at the time, a named party as a matter of past or present fact, or of threatened or contemplated private action, either is, is not, or may or may not be (i) in violation of such law or regulation or (ii) in compliance with any existing requirement for obtaining or retaining a license or other right or benefit.”

actions or refrain from taking certain actions. These case decisions and orders are not rendered and entered into by consent.

Unlike Consent Orders that may include agreed-to civil charges, unilateral orders issued after an IFF cannot include civil charges or penalties unless the proceeding is a Special Order proceeding under Va. Code § 10.1-1186 or under State Water Control Law authority regarding certain local programs.⁶

DEQ's media programs may also hold programmatic IFF's outside of the enforcement process to issue case decisions. For the most part, the following procedures apply to both types of proceedings with differences noted where necessary.

Programmatic IFFs

An APA proceeding (typically an IFF) or waiver thereof, is required whenever a DEQ media program issues a case decision determining whether a party has violated a legal requirement or has met requirements for obtaining or retaining a permit or other right or benefit. Programmatic IFFs may be used for purposes including, but not limited to, the following:

- To determine whether a Responsible Party operating pursuant to a solid waste permit by rule has violated certain requirements to justify loss of permit by rule status pursuant to 9 VAC 20-81-410.
- To issue a Notice to Comply under the Erosion and Sediment Control Law at Va. Code § 62.1-44.15:58 or the Stormwater Management Act at Va. Code §§ 62.1-44.15:37.⁷
- To issue a Stop Work Order under Va. Code § 62.1-44.15:58 of the Erosion and Sediment Control Law.⁸
- To determine whether a local program is deficient under the Stormwater Management Act, the Erosion and Sediment Control Law, or the Chesapeake Bay Preservation Act and to establish a compliance schedule.⁹

⁶ Pursuant to current statutory authority in the Stormwater Management Act at Va. Code § 62.1-44.15:38, the Erosion and Sediment Control Law at Va. Code 62.1-44.15:54, and the Chesapeake Bay Preservation Act at Va. Code 62.1-44.15:71, if a local program fails to comply with a corrective action agreement issued by the State Water Control Board, the Board may issue a special order following an APA proceeding. Such orders may include a civil penalty up to \$5,000 per day, with a maximum of \$20,000 per violation,

Beginning thirty days after the adoption of regulations pursuant to the Virginia Erosion and Stormwater Management Act, those statutes will expire, and a new provision in Va. Code § 62.1-44.15(19) will take effect authorizing the Board to issue a special order to a locality that failed to bring its program into compliance in accordance with a compliance schedule established by the Board. Such orders may impose a civil penalty up to \$5,000 per violation with the maximum amount of \$50,000. The Board may not delegate to DEQ its authority to issue special orders under this section.

⁷ Beginning thirty days after the adoption of regulations pursuant to the Virginia Erosion and Stormwater Management Act, those statutes will expire, and a new provision in Va. Code § 62.1-44.15:37 will state, "The issuance of a notice to comply by the Board shall not be considered a case decision as defined in § 2.2-4001." Therefore, an IFF will no longer be required to issue a notice to comply.

⁸ Currently, a formal hearing is required for DEQ to issue stop work order under the Stormwater Management Act, Va. Code § 62.1-44.15:37, or following a complaint by an aggrieved landowner under the Erosion and Sediment Control Law, Va. Code § 62.1-44.15:64. Beginning thirty days after the adoption of regulations pursuant to the Virginia Erosion and Stormwater Management Act, those statutes will expire, and a new provision in Va. Code § 62.1-44.15:37 will require only an IFF prior to issuing a stop work order.

⁹ Va. Code §§ 62.1-44.15:38, 62.1-44.15:54, 62.1-44.15:71. Beginning thirty days after the adoption of regulations to implement the Virginia Erosion and Stormwater Management Act, those statutes will expire, and a similar provision will take effect in Va. Code § 62.1-44.15(19). At that point, Article 2.3 of the State Water Control Law,

- To determine whether underground storage tanks are in violation of regulatory requirements and are ineligible for delivery, deposit, or acceptance of a petroleum product or other regulated substance.¹⁰
- To determine whether to certify equipment or facilities as pollution control equipment or facilities for tax exemption purposes, pursuant to Va. Code §§ 58.1-3660 or 58.1-3660.1.
- To determine whether certain types permit coverage should be denied
- To determine whether a specific type of equipment or activity would require a permit.

Regional Office staff should consult with the relevant Central Office media program in conducting programmatic IFFs. The same APA provisions applicable to enforcement IFFs also govern programmatic IFFs, including Va. Code §§ 2.2-4019 (Informal fact finding proceedings), 2.2-4020.1 (Summary case decisions), 2.2-4020.2 (Default), 2.2-4021 (Timetable for decision; exemptions), 2.2-4023 (Final orders), and 2.2-4024.1 (Disqualification).

1186 Special Order Proceedings

Section 10.1-1186(10) of the Code authorizes the DEQ Director to issue 1186 Special Orders following an IFF. Pursuant to Va. Code § 10.1-1182, an 1186 Special Order is “an administrative order issued to any party that has a stated duration of not more than twelve months and that may impose a civil penalty of not more than \$10,000.” Only the DEQ Director can impose civil penalties in an 1186 Special Order, and that authority by law cannot be delegated.

This enforcement action should be pursued only if (i) the relief sought can be achieved within twelve months and (ii) a maximum penalty of \$10,000 is adequate.

As provided in Va. Code § 10.1-1186(10), 1186 Special Orders may be issued to any person to comply with:

- The provisions of any law administered by the Air Pollution Control Board, the State Water Control Board, and the Virginia Waste Management Board (collectively, the “Boards”), the DEQ Director, or the Department.
- Any condition of a permit or certification.
- Any regulation of the Boards.
- Any case decision of the Boards or the DEQ Director.

Pre-Proceeding Matters

Referral Process

Prior to referring a case for an 1186 Special Order proceeding, Regional Office staff should prepare an enforcement recommendation and plan, civil penalty worksheet, and proposed consent order. If consent order negotiations do not resolve the case, then an APA referral is an appropriate next step. If Regional Office staff believe case-specific factors warrant moving forward with an

which is currently the Stormwater Management Act, will be replaced by the Virginia Erosion and Stormwater Management Act.

¹⁰ 9 VAC 25-580-370.

1186 Special Order proceeding without first proposing a consent order to the responsible party, they should consult with Central Office enforcement staff prior to submitting a referral.¹¹

To refer a case for an 1186 Special Order or other enforcement adjudication, Regional Office staff shall submit a Request for APA Action to Central Office, along with the agency records relevant to the enforcement action. Relevant records may include any registration statement, permit, inspection report, warning letter, notice of violation, substantive communications between DEQ and the responsible party, enforcement recommendation and plan, civil charge worksheet, and proposed consent order. The referral package is reviewed by the Enforcement Adjudication Manager, who provides a recommendation to the Director of Enforcement. The referral must be approved by the Director of Enforcement to move forward with an enforcement IFF.

Presiding Officer and Agency Advocate

After approving a referral for an enforcement IFF, the Director of Enforcement appoints the Presiding Officer from amongst DEQ staff. The Director of Enforcement issues a “Presiding Officer appointment memo” naming the Presiding Officer and describing their responsibilities in the case at hand, copying the RO Enforcement Staff, Regional Director, and the Adjudication Manager. The Agency Advocate provides the Presiding Officer procedural information about their role in the IFF. The Presiding Officer is responsible for running the IFF meeting and making a recommendation to the DEQ Director in an 1186 Special Order proceeding.¹²

The Presiding Officer should have basic knowledge of the laws and regulations involved in the case. All program managers within Pay Band 6 and above are authorized by DEQ’s Delegation Memo to serve in the capacity of a Presiding Officer. The Director of Enforcement may also authorize staff at lower pay bands to fill this role on as needed basis. Unlike a Hearing Officer who presides over a Formal Hearing, it is not necessary for a Presiding Officer to be an attorney.

Va. Code § 2.2-4024.1 prohibits the role of Presiding Officer from being filled by any person “who has served as investigator, prosecutor, or advocate at any stage” in the case or by any person “who is subject to the authority, direction, or discretion of an individual who has served as investigator, prosecutor, or advocate at any stage” in the case. Additionally, a Presiding Officer “is subject to disqualification for any factor that would cause a reasonable person to question the impartiality of the Presiding Officer . . . which may include bias, prejudice, financial interest, or ex parte communication,” and must disclose information relevant to any such factor to the parties. Va. Code § 2.2-4024.1. A Presiding Officer should disqualify him or herself and withdraw from a case if they do not believe that they can preside over the matter impartially or if they are aware of a factor that would cause a reasonable person to question their partiality. DEQ or the named party may petition for disqualification of the Presiding Officer upon notice that they will preside or upon discovering facts that are grounds for disqualification.

¹¹ In such cases, Regional Office staff should still develop an enforcement recommendation and plan and civil penalty worksheet prior to referral, justifying the injunctive actions and penalties available through an 1186 Special Order.

¹² In other types of IFFs, including delivery prohibition proceedings, a Presiding Officer with delegated authority may be the ultimate decision maker. In dual track underground storage tank cases, in which a delivery prohibition proceeding is combined with an 1186 Special Order proceeding, the Presiding Officer issues the delivery prohibition decision and makes a recommendation to the DEQ Director regarding the 1186 Special Order.

To avoid any appearance of partiality, it is best practice to select a Presiding Officer from a different regional office than where the case arose or from central office and to select an individual with no prior involvement in the case. To maintain the Presiding Officer's impartiality, the Agency Advocate, DEQ witnesses, and other staff involved in the case must not communicate with the Presiding Officer regarding the substance of the case outside of the IFF itself.

In an 1186 Proceeding or enforcement IFF, an Agency Advocate presents the agency's case. The Agency Advocate may be the Enforcement Adjudication Manager or other DEQ staff authorized by the Office of the Attorney General to represent DEQ in administrative proceedings, pursuant to Va. Code § 2.2-509. The Agency Advocate schedules the proceeding, drafts the notice for signature by the Director of Enforcement, conveys the notice and exhibits, prepares DEQ witnesses for the proceeding, presents DEQ's case and questions witnesses during the IFF, prepares a proposed Findings of Fact and Conclusions of Law and Proposed Order for the Presiding Officer's consideration following the IFF, and transmits the final case decision/order to the named party.

Statutory Rights of the Parties

Va. Code § 2.2-4019 provides that parties to an IFF have the right to:

- Have reasonable notice of the conference, including contact information for the DEQ staff person designated to answer questions and assist the named party;
- Appear in person or by counsel or other qualified representative for the informal presentation of factual data, argument or proof;
- Have notice of any contrary fact, basis or information in the possession of the agency which can be relied upon in making an adverse decision;
- Receive a prompt decision;
- Be informed, briefly and generally in writing, of any factual or procedural basis for an adverse decision; and
- Be notified if DEQ intends to consider public data, documents or information.

The Notice of the Proceeding

The notice of the proceeding lays out the basis for the case against a responsible party and explains the purpose and nature of the proceeding. The notice is drafted by the Agency Advocate and is signed by the Director of Enforcement. Some components of the notice letter mirror elements of a notice of violation; however the notice letter is issued as a separate document after a case has been referred to enforcement.¹³

The notice must be in writing and contain:

- A recitation of the rights of the party found in Va. Code § 2.2-4019 and set forth above.
- The date and time set for the proceeding.
- The place where an in-person IFF will be held and/or call-in information for a telephonic IFF.

¹³ Regional Office and Central Office concurrence is necessary to combine the Notice with the NOV.

- The nature and purpose of the proceeding.
- The basic law or laws under which the agency intends to exercise its authority, including Va. Code §§ 2.2-4019 and 10.1-1186 if applicable.
- The facts and pertinent law or regulations implicated for each alleged violation.
- What type of remedy will be sought, to include an 1186 Special Order with civil penalties and injunctive relief if applicable.
- Any public data, document and information upon which the agency plans to rely, as provided in § 2.2-4019(B). The notice should be accompanied by the exhibits upon which DEQ intends to rely.
- The name, telephone number, and email address of the DEQ staff designated to answer questions and assist the named party.

Notification that a default order may be issued against the named party if they fail without good cause to attend or appear at the IFF. Although not provided in the statute, it is recommended the notice be sent to the named party 30 calendar days prior to the proceeding.

If the named party has provided DEQ with an email address in an official communication with the Agency (e.g., in a permit application), the notice may be sent to the named party by email. The DEQ exhibits accompanying the notice may be sent to the responsible party by Vitashare transfer or email. The email conveying the notice should request that the named party acknowledge receipt. If the named party fails to acknowledge receipt, the Agency Advocate should call the named party to confirm that they received the notice. If DEQ is not able to confirm receipt of the notice by email, the notice should also be mailed to the Responsible Party at least two weeks prior to the date of the proceeding. If the named party has not provided an email address to DEQ, the notice and exhibits should be conveyed by mail. When the named party is a corporation, limited liability company, or other entity registered with the SCC, the notice should be sent (mailed, or emailed) to the registered agent for the company in addition to any contact-person on file with DEQ.

Conducting the Proceeding

The IFF is conducted to ensure that each party has a fair and adequate opportunity to present data, views, and argument. Section 2.2-4019 does not provide for cross examination of witnesses or rules of evidence. The Presiding Officer, however, is free to ask any questions necessary to make sure the record is complete and sufficient to base a decision.

Venue

In most cases, DEQ holds IFFs telephonically because it is the most efficient forum for the agency, as well as being most accessible for responsible parties. However, if the responsible party requests an in-person proceeding, DEQ should accommodate that request to the extent practicable. In some cases, DEQ may elect to hold a proceeding in person if warranted due to case-specific circumstances. To accommodate participation by all parties, DEQ may also hold a hybrid proceeding, in which some parties participate in person and others participate via conference call.

Pursuant to Va. Code § 2.2-4003, the appropriate venue for in-person proceedings is in the city or county where DEQ maintains its principal office or as the parties may otherwise agree. DEQ typically

holds in-person IFFs at the regional office for the region where the facility is located or where the alleged violations occurred, but IFFs may alternatively be held at DEQ's Central Office. The Regional Office will provide adequate equipment and adequate rooms in which to conduct the proceeding and to accommodate potential witnesses.

Recording the Proceeding

Although a transcript or recording is not required by law, an audio recording of the proceeding is recommended. An accurate record of the proceedings is essential if the decision maker is not present during the proceeding and if the case is appealed. The Presiding Officer must also prepare a summary of the proceeding to be included in the Recommendation Packet discussed below.

Presentation of Information

The Presiding Officer opens the proceeding by asking the parties to introduce themselves and providing background information about the type of proceeding at hand and an explanation of the process. As a preliminary matter, the Agency Advocate explains how the notice was conveyed and enters DEQ's exhibits into the record.

The Agency Advocate then gives a brief opening statement, summarizing DEQ's case, the information to be presented, and the relief requested. The Agency Advocate then presents DEQ's case, questioning DEQ's witnesses and referencing DEQ's exhibits.

The named party or their representative is then given the opportunity to present any relevant information. If a responsible party has documentary evidence that they would like to introduce, the Presiding Officer should accept delivery of such evidence by any reasonable method (e.g., email, fax, mail, hand delivery). In appropriate circumstances, the Presiding Officer should keep the record of the proceeding open to allow for submittal of documentation following the meeting.

Throughout the proceeding, the Presiding Officer may ask questions of any of the participants to elicit relevant information. Although cross examination of the parties is not available, participants may direct questions to the Presiding Officer, who may ask the appropriate person to speak to the issue if warranted.

At the end of the proceeding, the Agency Advocate and the named party or their representative may each give a closing statement summarizing their position.

Post Proceeding Matters

Time Restrictions on Rendering Case Decisions

The DEQ Director must render the decision in an 1186 Special Order proceeding within 90 days of the IFF or a later date as agreed by the party and the agency.¹⁴ The IFF proceeding is concluded on the date the record closes, and the decision is due within 90 days from the date the record closes. The APA must be consulted for the pertinent time restriction when a Hearing Officer is used to make a recommendation or to render the decision.

¹⁴ Va. Code § 2.2-4021.

The case may automatically be decided against the agency if the time frames in the APA are not followed. If the agency does not make a decision within 90 days of the conclusion of the IFF proceeding, the party may notify the agency in writing that a decision is due.¹⁵ If the agency does not make the decision within 30 days of receiving the notice, the decision is deemed in favor of the named party, precluding DEQ from ordering penalties or injunctive relief, or issue a case decision finding the Responsible Party in violation of legal requirements in the case.¹⁶ Provisions are made in the APA for situations where the agency personnel who conducted the informal proceeding are unable to attend to official duties due to sickness, disability, or termination of their official capacity with the agency.

In some cases, the parties may wish to submit proposed findings of fact and conclusions of law, briefs, or other post-proceeding documents. If they do, the parties may agree in writing that time limits for rendering a decision should not begin to run until all such post-proceeding activities are completed.

Agency Advocate's Proposal

Following the completion of the IFF, the Agency Advocate prepares a Proposed Findings of Fact and Conclusions of Law and a Proposed 1186 Special Order or case decision for the Presiding Officer's consideration. The Agency Advocate conveys the proposal to the Presiding Officer within approximately two weeks of the date the record closes for the proceeding and sends a copy to the named party. The named party may also submit Proposed Findings of Fact and Conclusions of Law.

Recommendation of the Presiding Officer

At the conclusion of the IFF, the Presiding Officer prepares a Recommendation Packet for the DEQ Director's consideration. The recommendation itself must contain an accurate summary of the issues to include the pertinent facts and the relevant law. The format should be Findings of Fact and Conclusions of Law. The Presiding Officer's recommended action would be included in the Conclusion section of the document. If the Presiding Officer recommends issuance of an 1186 Special Order, the recommendation packet should include a Recommended Order. The Presiding Officer conveys the Recommended Findings of Fact and Conclusions of Law and Recommended Order to the Director of Enforcement by email and provides a link to a file on a network drive. The file should contain the complete record of the proceeding, to include the exhibits, recording of the proceeding, and all submittals by the parties.

In order to give the DEQ Director adequate time to make a decision within the required 90 days, the Presiding Officer should submit the Recommendation Packet within approximately 45 days after concluding the proceeding.

Default

If a named party fails to attend an IFF without good cause the Presiding Officer may issue a default order and conduct all further proceedings to complete the IFF, including issuing a recommended

¹⁵ Va. Code § 2.2-4021.

¹⁶ This provision does not apply to case decisions before the State Water Control Board or DEQ to the extent necessary to comply with the federal Clean Water Act, the State Air Pollution Control Board or DEQ to the extent necessary to comply with the federal Clean Air Act, or the Virginia Soil and Water Conservation Board or the Department of Conservation and Recreation to the extent necessary to comply with the federal Clean Water Act.

decision.¹⁷ DEQ must notify the named party of the Presiding Officer's recommended decision after a default order.¹⁸ The named party may petition the Presiding Officer to vacate the recommended decision within 15 days of notification of its issuance.¹⁹ The Presiding Officer must vacate the recommended decision if the named party shows good cause for their failure to appear. In considering whether the named party failed to appear for good cause, the Presiding Officer should consider factors including:

- Whether the failure to appear has caused prejudice to DEQ — e.g., whether DEQ has had to expend additional resources or delay other administrative matters to address the party's failure to appear.
- Whether the failure to appear has caused any prejudice to the Commonwealth — e.g., whether the party's failure to appear has caused any additional harm to the Commonwealth's environment or has delayed DEQ's ability to remedy some harm to the environment.
- Whether the failure to appear was caused by the party's negligence or carelessness.
- Whether there are any documented extenuating circumstances which account for the party's failure to appear.
- Whether the party acted promptly to address his or her failure to appear.
- Whether the party has a potentially strong claim or meritorious defense — e.g., whether the underlying issue presents a close question of law or fact, or an untested legal issue (such as claims involving environmental justice).

The Presiding Officer may request that DEQ's Agency Advocate provide a response to the Petition to Vacate. Any such response shall be on the record and communicated to both the Presiding Officer and named party.

If the Presiding Officer vacates the recommended decision, the Agency Advocate should issue a new notice to the named party and hold a second IFF before the Presiding Officer. If the Presiding Officer determines that the named party has not shown good cause for failure to appear, the Presiding Officer should deny the motion to vacate, and the DEQ Director may proceed with issuing a final case decision based on the Presiding Officer's recommendation and the record from the initial IFF.

When a default order has been issued in an 1186 Special Order Proceedings, the DEQ Director should delay issuing a final decision until one of the following has occurred (1) the 15 days after notification of the recommended decision have passed without the named party filing a petition to vacate, (2) the Presiding Officer has denied a petition to vacate the recommended decision, or (3) the Presiding Officer has granted a petition to vacate, held another IFF, and issued a new recommended decision based on the record of the second IFF.

¹⁷ Va. Code § 2.2-4020.2 (A) and (C). For these provisions to apply, the notice letter must have notified the named party that a default order may be issued against them if they failed to appear without good cause. Va. Code § 2.2-4020.2(B).

¹⁸ Va. Code § 2.2-4020.2 (E).

¹⁹ Va. Code § 2.2-4020.2 (E)..

The Case Decision and Order

The named party to the proceeding is entitled to be informed briefly and generally in writing of the factual or procedural basis for an adverse decision in any case.²⁰ If the decision is in the favor of the named party, the case decision need only indicate that fact. An adverse decision, however, must contain:

- The legal authority for the agency action.
- A recitation of the facts that form the basis for the decision.
- A recitation of the procedural events leading to the informal proceeding.
- The factual basis for the decision, including any statements as to the credibility of witnesses.
- The conclusion as to what violations if any, have occurred.
- In an 1186 Special Order, the injunctive relief and/or penalty ordered.
 - The relief must be within that authorized by the basic law such as compliance with regulations, cessation of unlawful discharge, etc.
 - The relief must be within that authorized by regulations.
 - The relief must make sense in the factual setting.
 - The relief must be possible.
 - Deadlines must be included for injunctive relief, within one year of the date of the order for 1186 orders.
 - Civil penalties in 1186 orders are limited to \$10,000.
 - Signature of the ultimate decision maker. All 1186 Special Orders containing civil penalties can be signed only by the Director of DEQ.

In an 1186 Special Order, the DEQ Director will approve, disapprove, or modify the recommendations of the Presiding Officer within the remaining days provided by statute. Where appropriate the Director can adopt the Findings of Fact and Conclusions of Law recommended by the Presiding Officer or proposed by the named party.

Rule 2A:2: Party's Rights of Appeal

The following language should be included in the transmittal letter of any final agency decision made by a Board, the DEQ Director, or the Department pursuant to an IFF or a formal hearing:

You have the right to appeal any part or all of this decision pursuant to Va. Code § 2.2- 4026 in the manner provided by Rule 2A:2 of the Rules of the Virginia Supreme Court. You have 33 days from the date of service of this decision within which to initiate an appeal. Rule 2A:2 also requires that "[t]he notice of appeal shall identify the regulation or case decision appealed from, shall state the names and addresses of the appellant and of all other parties and their counsel, if any, shall specify the circuit court to which the appeal is taken, and shall conclude with a certificate that a copy of the notice of appeal has been

²⁰ Va. Code § 2.2-4019 (A)(v).

mailed to each of the parties." A copy of Rule 2A:2 is enclosed with this letter. If you chose to appeal this decision, a Notice of Appeal must be directed to:

[Name], Director
Department of Environmental Quality
P.O. Box 1105
Richmond, VA 23218
Attention: Enforcement Division

Service of Case Decision and Order

The case decision and order must be served by mail within five days of the decision being rendered unless service by another means is acknowledged by the named party in writing. If DEQ has an email address for the named party, the case decision should also be conveyed by email.

Data Entry and Compliance Tracking

During the time between the approval of an APA referral and issuance of the final decision, the Agency Advocate is responsible for entering data into CEDS regarding the administrative proceeding and its outcome. After a decision has been issued, the case is returned to the original Regional Office enforcement representative, who is responsible for tracking subsequent compliance. 1186 Special Orders are tracked for the same purposes using the same systems as Consent Orders, but are considered a separate category of orders.

If the named party fails to comply with requirements of an 1186 Special Order, Regional Office staff should confer with Central Office enforcement staff to develop a plan for addressing the noncompliance. When a responsible party misses a deadline in an 1186 Special Order by at least 60 days, Central Office enforcement staff may refer the matter to the Office of the Attorney General to enforce the terms of the order.

The Agency Advocate enters the records from the APA proceeding into ECM, including the approved referral, Presiding Officer appointment memorandum, notice letter, exhibits, Agency Advocate's proposed findings of facts and conclusions of law and proposed order, Presiding Officer's Recommended Findings of Fact and Conclusions of Law, and the final decision and transmittal letter. Regional Office staff are responsible for entering into ECM records preceding the APA referral and records subsequent to the final decision.

Formal Hearings

DEQ and the citizen boards use Formal Hearings to issue certain types of unilateral case decision and orders when required by statute or regulation. Like IFFs, Formal Hearings may be used to resolve enforcement cases or programmatic issues. When DEQ's legal authority requires a "hearing," DEQ must provide a Formal Hearing under Va. Code § 2.2-4020.²¹ Uses of Formal Hearings include the following:

²¹ Va. Code § 2.2-4020 states, "The agency shall afford opportunity for the formal taking of evidence upon relevant fact issues in any case in which the basic laws provide expressly for decisions upon or after hearing."

- Issuing special orders assessing civil penalties of up to \$32,500 per violation, up to \$100,000 per order, if specified conditions are met pursuant to Va. Code §§ 10.1-1309 (air); 10.1-1455(G) (waste); and 62.1-44.15(8a) and (8b), (water).²²
- Issuing special orders to persons constructing or operating natural gas transmission pipelines greater than 36 inches inside diameter, assessing civil penalties of up to \$50,000 per violation, up to \$500,000 per order, if specific conditions are met.
- Affirm emergency orders pursuant to Va. Code §§ 10.1-1309(B); 10.1-1455(G); and 62.1-44.15(8b)
- Issuing sanitary sewer overflow (“SSO”) hearing special orders; or reviewing SSO consent orders upon petition by any person who commented on the SSO Consent Order, where the evidence presented in support is material and not considered in the issuance of the order.²³
- Revoking most types of Permits issued by DEQ or the citizen boards.²⁴
- When demanded by certain owners under the State Water Control Law “aggrieved by any action of the State Water Control Board taken without a formal hearing, or by inaction of the Board.”²⁵
- When requested by an “owner or other party significantly affected by an action of the [Air Pollution Control Board] taken without a formal hearing or by inaction of the board.”²⁶

Regional Office staff should consult with the relevant Central Office media program and Central Office enforcement staff regarding programmatic formal hearings. Central Office staff should also consult with the Office of the Attorney General throughout the formal hearing process to ensure compliance with the APA and other legal requirements. The same APA provisions applicable to enforcement hearings also govern programmatic hearings, including Va. Code §§ 2.2-4020 (Formal Hearings), 2.2-4020.2 (Default), 2.2-4021 (Timetable for decision; exemptions), 2.2-4022 (Subpoenas, depositions and requests for admissions), 2.2-4023 (Final orders), 2.2-4023.1 (Reconsideration); 2.2-4024 (Hearing officers); 2.2-4024.1 (Disqualification); 2.2-4024.2 (Ex parte communications).

²² Chapter 706, 2005 Acts of Assembly (S.B. 1089) authorized the State Water Control Board, the Virginia Waste Management Board and the State Air Pollution Control Board (“Boards”) to issue special orders assessing civil penalties of up to \$32,500 per violation, up to \$100,000 per order, if specified conditions are met. These requirements have been codified at Va. Code §§ 10.1-1309 and 10.1-1316 (air); 10.1-1455 (waste); and 62.1-44.15, 62.1-44.32 and 62.1-44.34:20 (water). The legislation also required DEQ to develop uniform procedures to govern the formal hearings conducted pursuant to these sections to ensure they are conducted in accordance with the Administrative Process Act, any policies adopted by the Boards and to ensure that facility owners and operators have access to information on how such hearings will be conducted. In response, DEQ has developed these Procedures. Although prompted by the legislature’s directive to develop procedures for formal hearings pursuant to Va. Code §§ 10.1-1309, 10.1-1455, and 62.1-44.15, it is recommended that these Procedures be used for any formal hearing conducted for DEQ.

²³ Va. Code § 62.1-44.15(8f).

²⁴ See Va. Code § 62.1-44.15(5b); 9 VAC 20-81-570(C); 9 VAC 5-170-40(A)(3)(a).

²⁵ Va. Code § 62.1-44.25. The statute currently applies to owners under Va. Code §§ [62.1-44.16](#) (industrial wastes), [62.1-44.17](#) (other wastes), and [62.1-44.19](#) (sewerage systems and sewage treatment works). Beginning thirty days after the adoption of regulations pursuant to the Virginia Erosion and Stormwater Management Act, the statute will also apply to owners under the Virginia Erosion and Stormwater Management Act and Erosion and Sediment Control Law.

²⁶ 9 VAC 5-170-200.

Special Orders After a Formal Hearing

Va. Code §§ 10.1-1309; 10.1-1455(G); and 62.1-44.15(8a) and (8b)²⁷ set forth specific procedural pre-requisites that must be met for the citizen boards to issue special orders with penalties up to \$100,000 per order:

- 1) DEQ must have issued the responsible party at least two notices of alleged violation (“NOAVs”) for the same or substantially related violations at the same site. Note that both Warning Letters and Notices of Violation are NOAVs for purposes of this requirement, so it is not always necessary for DEQ to issue two Notices of Violation prior to the formal hearing. The NOAVs must have been issued to the same person for the same site or facility. If the alleged violations in the two NOAVs are not identical, Regional Office staff should consult with Central Office enforcement staff when drafting the second NOAV in anticipation of a potential formal hearing to ensure that the NOAVs demonstrate a clear nexus between substantially related violations.
- 2) The violations at issue must not have been resolved by demonstration that there was no violation, by an order issued by the Board or the Director, or by other means,
- 3) At least 130 days must have passed since DEQ issued the first NOAV. DEQ should not issue a Notice of Formal Hearing until at least 130 days after issuing the first NOAV (either Warning Letter or Notice of Violation) in the case. The statutes do not require a certain amount of time to pass between issuance of the two NOAVs, nor do they specify an amount of time after issuance of the second NOAV.
- 4) There is a finding that such violations have occurred after a formal hearing. Under the Air Pollution Control Law and Virginia Waste Management Act, the hearing must be conducted before a Hearing Officer appointed by the Supreme Court (as discussed in Part II.D.3 below). Under the State Water Control Law, the hearing must be held before a quorum of the State Water Control Board if requested by the Responsible Party; otherwise, the hearing must be held before a Hearing Officer appointed by the Supreme Court.

In addition the above procedural criteria, Va. Code §§ 10.1-1309, 10.1-1455(G), and 62.1-44.15(8a) each set forth a list of violations for which the Citizens Board may issue a unilateral special order after a formal hearing. While the statutes are broadly worded to include most classes of violations, enforcement staff should reference the relevant media statute to ensure the violation types at issue falls within one of the specified categories.

The penalty guidance set forth in Chapter Four applies to calculation of the proposed penalty for unilateral special orders after formal hearings. However, the maximum penalty per order is statutorily capped at \$100,000. If the calculated penalty amount exceeds \$100,000, Regional Office enforcement staff should consult with Central Office enforcement staff regarding whether a special order would be an appropriate resolution to the case or whether the case warrants

²⁷ The State Water Control Law includes slightly different requirements for special orders issued after formal hearings to natural gas transmission pipelines greater than 36 inches inside diameter. Va. Code § 62.1-44.15(8g). The statute includes higher penalty authority for such orders--\$50,000 per violation, up to \$500,000 per order. The NOAV requirement in this subsection also differs from other State Water Control Law special orders. DEQ must have issued at least two NOAVs to the responsible party for violations involving the same pipeline (the violations do not have to be substantially similar, and there is no requirement for 130 days to have passed after the first NOAV).

referral to the Office of the Attorney General. The statutes require the penalty calculation to be provided to the responsible party prior to the formal hearing, and DEQ should include the Civil Charge/Civil Penalty worksheet as an exhibit with the Notice of Formal Hearing.

The State Water Control Law and Virginia Waste Management Act require DEQ to provide at least 30 days' notice of the time, place, and purpose of a formal hearing. The Air Pollution Control Law requires reasonable notice of the time, place, and purpose of the hearing.

DEQ does not have delegated authority under the State Water Control Law to issue unilateral special orders after formal hearings.²⁸ DEQ conducts the formal hearing and presents the hearing officer's recommendation to the Board, but the State Water Control Board must issue the final decision.

Va. Code §§ 10.1-1309; 10.1-1455(G); and 62.1-44.15(8b) and 62.1-44.12 include specific requirements for service of special orders issued after formal hearings, and tie the effective date of the orders to the date of service, as discussed in Part II.F.8 below.

Emergency Orders

In certain emergency circumstances the citizens boards are authorized to issue emergency orders requiring immediate injunctive relief without a prior hearing.²⁹ However, a formal hearing must be held after issuance of the emergency order.

If Regional Office staff believe that there is an emergency warranting issuance of an emergency order, they should consult with Central Office enforcement and media staff immediately. Each media statute has a different standard for when an emergency order may be issued:

- Under the Virginia Waste Management Act, a qualifying emergency is when a Responsible Party is “adversely affecting the public health, safety or welfare, or the environment.”³⁰
- Under the Air Pollution Control Law, a Responsible Party must be “unreasonably affecting the public health, safety or welfare, or the health of animal or plant life, or property.”³¹
- Under the State Water Control Law, a Responsible Party must be “grossly affecting or presents an imminent and substantial danger to (i) the public health, safety or welfare, or the health of animals, fish or aquatic life; (ii) a public water supply; or (iii) recreational, commercial, industrial, agricultural or other reasonable uses.”³²
- Under Article 11 of the State Water Control Law, an oil discharge must pose a serious threat to (i) the public health, safety or welfare or the health of animals, fish, botanic or aquatic life; (ii) a public water supply; or (iii) recreational, commercial, industrial, agricultural or other reasonable uses.”³³

²⁸ Va. Code § 62.1-44.14.

²⁹ Va. Code §§ 10.1-1309; 10.1-1455(G); and 62.1-44.15(8b).

³⁰ Va. Code § 10.1-1455(G).

³¹ Va. Code § 10.1-1309.

³² Va. Code § 62.1-44.15(8b).

³³ Va. Code § 62.1-44.34:20

Under the Virginia Waste Management Act and Air Pollution Control Law, DEQ must make a reasonable attempt to give notice prior to issuing an emergency order. This prior notice should be issued by email (or mail if DEQ does not have an email address for the responsible party). The prior notice should include a summary of the factual observations indicating the existence of an emergency situation and notification of DEQ's intent to issue an emergency order pursuant to the relevant statute. The State Water Control Law does not require prior notice.

Waste and air emergency orders may include requirements for the responsible party to both cease the activity causing the emergency conditions and to undertake any needed corrective action. Water emergency orders may only direct the responsible party to cease the pollution or discharge immediately.

A hearing is required soon after issuance of an emergency order to affirm, modify, amend, or cancel the emergency order. Under the Virginia Waste Management Act and Air Pollution Control Law, the hearing must be held within 10 days of the date of the emergency order. Under the State Water Control Law, when the order requires cessation of a discharge, the hearing must be held within 48 hours of issuance of the emergency order.

Due to the short time period between issuance of an emergency order and the formal hearing, DEQ should provide notice of the time and place of the hearing at the time the emergency order is issued or as soon thereafter as possible.

SSO Hearing Special Orders Proposed Orders, Notice and Comment

In 2007, the General Assembly enacted Senate Bill 798 ("SB 798"), which added subdivision (8f) to Va. Code § 62.1-44.15, which added requirements for the Board to provide public notice and an opportunity for public comment on proposed SSO hearing special orders³⁴. Subdivision (8f) also imposed requirements to notify commenters of any hearing, or to allow them to be heard and present evidence.

Accordingly, before initiating a formal hearing, staff will develop a proposed SSO hearing special order for public notice and comment, containing proposed findings of fact and conclusions of law and the injunctive and penalty relief requested. Any draft consent order that was developed during failed negotiations with the owner can be used as the basis for preparing the proposed SSO hearing special order. In developing the proposed order, however, staff are not bound by positions taken in negotiation, and staff should prepare the strongest order supported by the available evidence, including the assessment of any civil penalty.³⁵

Public notice follows the process in 9 VAC 25-31-910(B)(3). DEQ staff should inform the owner of the impending public notice and comment on the order. Any person who comments on the proposed order must also be given notice of any hearing to be held on the order, and a reasonable opportunity to be heard and to present evidence there. The notice to commenters

³⁴ SSO hearing special orders are special order issued after a hearing pursuant to Va. Code § 62.1-44.15(8a) to an owner of a sewerage system requiring corrective action to prevent or minimize overflows of sewerage from such system.

³⁵ See Va. Code § 62.1-44.15(8a). Orders issued pursuant to this subsection may include civil penalties of up to \$32,500 per violation, not to exceed \$100,000 per order.

should set a deadline (e.g., 30 days after the notice) for commenters to request an opportunity to be heard and present evidence. DEQ may name a person separate from the agency advocate to coordinate public comment and to work with those who request to be heard and present evidence at the hearing.

SSO Hearing Special Orders – Hearing and Decision

After notice and comment, the hearing follows the requirements of Va. Code [§ 2.2-4020](#) and the procedural guidance in this chapter. DEQ and the facility owner (and the petitioner, if the hearing is the result of a successful petition) are parties to the hearing. Any person who has commented on the proposed order shall have a reasonable opportunity to be heard and to present evidence in accordance with the notice.³⁶ The hearing officer, or quorum of the Board, may make such arrangements as are appropriate for the taking of evidence from commenters.

Any person who participated in the prior proceeding, whether conducted by a hearing officer or the Board itself, must be provided an opportunity to respond at the Board meeting to any summaries of the prior proceeding prepared by or for the Board.³⁷ The Board may, in its discretion, take other public comment. The Board will then issue the SSO hearing special order, amend and issue the SSO hearing special order, reject the order or take other action as it deems appropriate under Va. Code [§ 2.2-4020](#), in accordance with the timetables for decisions set out in Va. Code [§ 2.2-4021](#).

Following the issuance of the SSO hearing special order, parties and persons who commented on the proposed order may seek judicial review, subject to the requirements of Va. Code [§ 62.1-44.29](#).

SSO Consent Special Order Hearing Following Successful Petition

Subdivision (8f) of Va. Code [§ 62.1-44.15](#) sets out new rights for persons who comment on a proposed SSO consent special order³⁸ after the order is issued. Any person who commented on the proposed order may file a petition, within 30 days after the issuance of the order, requesting that the Board set aside the SSO consent special order and provide a formal hearing on it. The Director, as authorized by the Board, may rely on the written record or staff certifications in considering the petition. If the evidence presented by the petitioner (1) is material and (2) was not considered in the issuance of the order, the Director should immediately set aside the order, provide for a formal hearing, and make the petitioner a party to the hearing. All other persons who commented on the proposed SSO consent special order should be given notice of the formal hearing and should have a reasonable opportunity to be heard and to present evidence there.

If a hearing is being held as the result of a successful petition of an SSO consent special order, public notice and comment **on the order** need not be repeated. The petitioner, however, is a party to the formal hearing, and any person who commented on the proposed SSO consent special order must be given notice of the hearing and the opportunity to be heard and present evidence there. Again, the notice to commenters should set a deadline (e.g., 30 days after the

³⁶ See Va. Code [§ 62.1-44.27](#) (rules of evidence in Board hearings).

³⁷ Va. Code [§ 2.2-4021\(A\)](#).

³⁸ SSO consent special orders are special orders issued by consent pursuant to Va. Code [§ 62.1-44.15\(8d\)](#) to an owner of a sewerage system requiring corrective action to prevent or minimize overflows of sewerage from such system.

notice) for commenters to request an opportunity to be heard and present evidence. The process for a hearing on the SSO consent special order then follows that for SSO hearing special orders, as described above. After the hearing, the Director may issue the SSO consent special order or decline to issue the SSO consent special order. If the Director declines to issue the SSO consent special order, DEQ staff may re-negotiate the SSO consent special order with the responsible party or decide on a different course of action.

Pre-Hearing Matters

Referral for Formal Hearing

A referral to the Central Office Division of Enforcement is required for formal hearings to resolve enforcement cases. Prior to referring a case for a formal hearing seeking a special order with a penalty, regional office staff should prepare an enforcement recommendation and plan, civil penalty worksheet, and proposed consent order. If consent order negotiations do not resolve the case, then a formal hearing referral is an appropriate next step.

To refer a case for a formal hearing, Regional Office staff shall submit a Request for APA Action to Central Office, along with the agency records relevant to the enforcement action. Relevant records may include any registration statement, permit, inspection report, warning letter, notice of violation, substantive communications between DEQ and the responsible party, enforcement recommendation and plan, civil charge worksheet, and proposed consent order. The referral package is reviewed by the Enforcement Adjudication Manager, who provides a recommendation to the Director of Enforcement. The referral must be approved by the Director of Enforcement to move forward with a formal hearing.

If expedited action is necessary for issuance of an emergency order, Central Office enforcement and programmatic staff should be consulted immediately upon discovery of the emergency condition.

Agency Advocate

Upon approval of a formal hearing referral, the Director of Enforcement designates an Agency Advocate to represent DEQ in the hearing. Due to the formal, legal nature of a hearing under the APA, the Agency Advocate should be an attorney; the Agency Advocate may be either an attorney on DEQ staff or an attorney with the Office of the Attorney General. To serve as the Agency Advocate in a formal hearing, DEQ staff must be authorized by the Office of the Attorney General to represent DEQ in administrative proceedings, pursuant to Va. Code § 2.2-509.

The Agency Advocate requests appointment of the Hearing Officer, arranges for a court reporter to prepare a transcript of the hearing, drafts the notice for signature by the Director of Enforcement, conveys the notice and exhibits, participates in any pre-hearing conferences, drafts a pre-hearing statement if requested by the Hearing Officer, drafts any necessary motions or briefs, exchanges information with the named party or their counsel, requests any necessary subpoenas, prepares DEQ witnesses for the proceeding, presents DEQ's case and conducts direct and cross examination during the proceeding, prepares a proposed Findings of Fact and Conclusions of Law for the Hearing Officer's consideration following the hearing, and transmits the final case decision/order to the named party.

Hearing Officer

With the exception of special order hearings held before a quorum of the State Water Control Board at the responsible party's request, DEQ's formal hearings are presided over by a Hearing Officer appointed by the Supreme Court of Virginia. The Executive Secretary of the Supreme Court of Virginia maintains a list of Hearing Officers who may preside over formal hearings. At an agency's request, the Executive Secretary will name a Hearing Officer from this list, selected on a rotation system maintained by the Executive Secretary. Hearing Officers are attorneys in good standing in the Virginia State Bar who have practiced law for at least five years and have completed required trainings.³⁹

DEQ's Agency Advocate requests appointment of a Hearing Officer by emailing the Office of the Executive Secretary at hearingofficer@vacourts.gov. The email should provide general information regarding the proceeding, including the requesting party (DEQ), the parties involved (the Responsible Party and DEQ and/or the citizens board), and the hearing location (typically the regional office serving the location where the violation occurred). The Office of the Executive Secretary will then provide the name and contact information for the Hearing Officer.

Upon designation of the Hearing Officer by the Office of the Executive Secretary, DEQ should issue an appointment letter to the Hearing Officer. The appointment letter advises the Hearing Officer of their authorities and responsibilities with respect to conducting the formal hearing and pre- and post-hearing matters.

A Hearing Officer "is subject to disqualification for any factor that would cause a reasonable person to question the impartiality of the . . . hearing officer, which may include bias, prejudice, financial interest, or ex parte communication," and must disclose information relevant to any such factor to the parties.⁴⁰ A Hearing Officer should disqualify him or herself and withdraw from a case if they do not believe that they can preside over the matter impartially or if they are aware of a factor that would cause a reasonable person to question their impartiality. DEQ or the named party may petition for disqualification of the Hearing Officer upon notice that they will preside or upon discovering facts that are grounds for disqualification.

The Agency Advocate must include the named party or their counsel on all communications with the Hearing Officer regarding the case, copying them on any email or letters to the Hearing Officer and avoiding any ex parte verbal conversations with the Hearing Officer.

A Hearing Officer's responsibilities include the following:

1. Establish the date and place of the hearing and provide notice of these to the parties, if not previously set by DEQ (such as in the case of a hearing following an emergency order).
2. Manage the pre-hearing exchange of information so that all parties have access to the information that may be entered into evidence and the identity of the witnesses who may be called.
3. Establish the hearing procedure to be used and communicate this to the parties so they will know what to expect. This should be done during a pre-hearing conference.

³⁹ Va. Code § 2.2-4024.

⁴⁰ Va. Code § 2.2-4024.1.

4. Manage the transcript and record of the case. The record should include a transcript of the hearing from a court reporter, all evidence submitted or information exchanged, and any subsequent motions and pre- and posthearing filings.
5. Control the hearing and the parties in a professional manner. This includes creating a setting that enables the parties to provide the Hearing Officer with the evidence needed to make a recommendation. Accordingly, the Hearing Officer must be prepared to deal with and make any necessary accommodations for parties with special needs. The Hearing Officer must also manage the attendance and participation of third parties as appropriate. In the absence of a statute or agency regulation to the contrary, DEQ hearings are open to the public, and the Hearing Officer has a duty to control media and spectators in the interest of providing a fair hearing and protecting the interests of all involved.
6. On a timely basis, make a recommendation to the decision maker.

Statutory Rights of the Parties

Va. Code § 2.2-4020 provides that parties to a formal hearing have the right to:

- Have reasonable notice of:
 - The time, place, and nature of the hearing;
 - The basic law under which the DEQ contemplates exercising its authority;
 - Matters of fact and law asserted or questioned by DEQ; and
 - Contact information of the DEQ staff designated to respond to questions or otherwise assist a named party;
- Be accompanied by and represented by counsel;
- Submit oral and documentary evidence and rebuttal proofs;
- Conduct such cross-examination as may elicit a full and fair disclosure of the facts;
- Have the proceedings completed and a decision made with dispatch;
- Have the opportunity, on request, to submit proposed findings and conclusions and statements of reasons therefore, and
- Have the opportunity, on request, for oral argument to the Hearing Officer

The Notice of the Formal Hearing

The notice of the Formal Hearing explains the purpose and nature of the proceeding. The notice is drafted by the Agency Advocate and is signed by the Director of Enforcement.

The notice must be in writing and contain:

- A recitation of the rights of the party found in Va. Code § 2.2-4020;
- The nature and purpose of the proceeding;
- The basic law or laws under which the agency intends to exercise its authority, including Va. Code § 2.2-4020
- The facts and pertinent law or regulations implicated for any alleged violation;
- Any other factual assertions that form the basis for DEQ's intended action;
- What type remedy or decision will be sought (e.g., a special order with civil penalties and injunctive relief, a case decision revoking a permit, a case decision affirming an emergency order, or a case decision affirming a prior action of the State Water Control Board).

- The names of the Hearing Officer and Agency Advocate.
- The name, telephone number, and email address of the DEQ staff designated to answer questions and assist the named party.
- Notification that a default order may be issued against the named party if they fail without good cause to attend or appear at the hearing.
- For hearings regarding emergency orders, the date, time, and location of the Hearing (other hearings will typically be scheduled via a pre-hearing conference after issuance of the notice).

The notice should be accompanied by the exhibits upon which DEQ intends to rely.

For most types of formal hearing, the notice should be issued at least 30 calendar days prior to the hearing. However, reasonable notice for hearings regarding emergency orders will be shorter due to statutory requirements to conduct the hearing within 15 days (air and waste) or 48 hours (water) after issuance of the emergency order.⁴¹ Due to the short time period between issuance of an emergency order and the formal hearing, DEQ should issue the notice of formal hearing concurrently with issuance of the emergency order, or as soon thereafter as possible.

If the named party has provided DEQ with an email address in an official communication with the Agency (e.g., in a permit application), the notice may be sent to the named party by email. The DEQ exhibits accompanying the notice may be sent to the responsible party by Vitashare transfer or email. The email conveying the notice should request that the named party acknowledge receipt. If the named party fails to acknowledge receipt, the Agency Advocate should call the named party to confirm that they received the notice. If DEQ is not able to confirm receipt of the notice by email, the notice should also be mailed to the Responsible Party. If the named party has not provided an email address to DEQ, the notice and exhibits should be conveyed by mail. When the named party is a corporation, limited liability company, or other entity registered with the SCC, the notice should be sent to the registered agent for the company in addition to any contact-person on file with DEQ. The Hearing Officer should be copied on the Notice of Formal Hearing.

Absent instructions from DEQ to the contrary, the Hearing Officer is responsible for scheduling the hearing (which may be accomplished during a pre-hearing conference, as discussed below) and providing notice to the parties. Hearings should be scheduled at a time and manner convenient to all parties. Unless previously specified by DEQ, the place at which the hearing will be held shall be determined by the Hearing Officer. The hearing should be held at a place that satisfies venue requirements (see Part I.B.2.a above) and is convenient to the parties.

Pre-Hearing Conferences and Statements

In the notice of formal hearing, or by separate motion, DEQ may request that the Hearing Officer schedule a pre-hearing conference.⁴² Any pre-hearing conference is to be scheduled with due regard for the convenience of all parties, and should allow reasonable notice of the time, place, and purpose of the conference to all parties. The pre-hearing conference is on the record and may be held by telephone or in person. Topics that may be included in a pre-hearing conference are:

⁴¹ Va. Code §§ 10.1-1309; 10.1-1455(G); 62.1-44.15(8b); 62.1-44.34:20.

⁴² A pre-hearing conference may also be requested by the named party or scheduled on the Hearing Officer's own initiative.

- a. Identification, simplification, and clarification of the issues;
- b. Explanation of procedures, establishment of dates and deadlines (i.e., for hearings or submission of documents), and explanation of the roles of the parties, representatives, and Hearing Officer;
- c. Stipulations and admissions of fact and of the content and authenticity of documents;
- d. Disclosure of the number and identities of witnesses;
- e. Exploration of the possibility of settlement⁴³; and
- f. Exploration of such other matters as shall promote the orderly and prompt conduct of the hearing.

A Hearing Officer may require all parties to prepare pre-hearing statements at a time and in a manner established by the Hearing Officer. Topics that may be included in a pre-hearing statement are:

- a. Issues involved in the case;
- b. Stipulated facts (together with a statement that the parties have communicated in a good faith effort to reach stipulations);
- c. Facts in dispute;
- d. Witnesses and exhibits to be presented, including any stipulations relating to the authenticity of documents and witnesses as experts;
- e. A brief statement of applicable law;
- f. The conclusion to be drawn, and
- g. The estimated time required for presentation of the case.

Exchange of Information and Subpoenas

The hearing officer may require all parties to exchange information that they intend to rely upon in advance of the hearing. Information to be exchanged should include a list of witnesses each party intends to call and any documents that will be entered into evidence. The hearing officer may also require copies of all such documents be sent to him or her in order to prepare for the hearing. A copy of any document submitted to the hearing officer must be provided to all parties. The hearing officer should set a date for the exchange of information that will provide the parties with adequate time to prepare for the hearing and object to admissibility of evidence.

The APA does not permit discovery proceedings; however, there are certain procedures available to procure relevant information by subpoena.⁴⁴ Va. Code § 2.2-4022 provides that “[t]he agency or its designated subordinates may, and on request of any party to a case shall, issue subpoenas requiring testimony or the production of books, papers, and physical or other evidence.” Additionally, “[d]epositions de bene esse and requests for admissions may be directed, issued, and taken on order of the agency for good cause shown; and orders or authorizations therefore may be challenged or enforced in the same manner as subpoenas.”

⁴³ The hearing officer should not attend or preside at any settlement or alternative dispute resolution conferences, and settlement discussions shall not be made a part of the record.

⁴⁴ Va. Code § 2.2-4022.

The authority to issue subpoenas is retained by the Director of DEQ or his or her designee unless it is delegated to the Hearing Officer.⁴⁵

Any person who is subpoenaed may petition the hearing officer to quash or modify the subpoena. A hearing officer may quash or modify a subpoena where the evidence sought is irrelevant or inadmissible, or when the subpoena was illegally or improvidently granted. If a hearing officer refuses to quash a subpoena, the objecting party may petition the circuit court for a decision on the validity of the request for the subpoena. If a party refuses to comply with a subpoena, the hearing officer may procure enforcement from the circuit court. The appropriate circuit court is determined by Va. Code § 2.2-4003.

The statutory right to a subpoena duces tecum is not unlimited. Va. Code § 2.2-4022 creates a right for the parties to subpoena only evidence that is relevant and admissible as evidence in the administrative proceeding. *See State Health Dept. Sewage Handling & Disposal Appeal Review Board v. Britton*, 15 Va. App. 68, 70 (1992).

Conducting the Hearing

The Hearing Officer will introduce the case and make whatever introductory comments he or she deems appropriate. The Hearing Officer is expected to promote and maintain decorum at all times.

The party with the burden of proof (“the proponent”) will make an opening statement, which will be followed by the opposing party’s opening statement. Generally, the standard of proof in administrative hearings is a preponderance of the evidence. In enforcement proceedings, DEQ bears the burden of proof. In a permitting appeal, the Petitioner bears the burden of proof. The proponent will then present its case. Witnesses shall be placed under oath prior to rendering testimony. After the proponent has completed its case, the opposing party will present its case.

Each party will be allowed to make a closing argument at the end of the hearing. The proponent will speak first. A party may waive a closing argument and rely on written findings of fact and conclusions of law in lieu thereof.

The Agency Advocate presents DEQ’s opening statement, conducts direct examination of DEQ’s witnesses, cross-examines the named party’s witnesses, and may make a closing argument. The Agency Advocate may also object to admission of evidence proffered by the named party on evidentiary grounds, including relevance.

The APA provides that the Hearing Officer may receive probative evidence, exclude irrelevant, immaterial, insubstantial, privileged, or repetitive proofs, rebuttal, or cross-examination and rule upon offers of proof.⁴⁶

Formal rules of evidence do not apply to administrative hearings, and evidence which would not be admissible in a court may be admitted and considered by the Hearing Officer. The

⁴⁵ For hearings under the State Water Control Law, 9 VAC 25-230-150 authorizes the Hearing Officer to issue subpoenas. DEQ may also authorize a Hearing Officer to issue subpoenas in an appointment letter.

⁴⁶ Va. Code § 2.2-4020 C.

Virginia Supreme Court has stated that the rules of evidence are relaxed in administrative proceedings and that the findings of administrative agencies will not be reversed solely because evidence was received which would have been inadmissible in court.⁴⁷ Hearsay may be admissible, provided it is otherwise reliable. The probative weight of hearsay evidence is left to the Hearing Officer's discretion.

Unless a statute or agency regulation requires otherwise, any evidence may be admitted if it appears to be relevant, reliable, and not otherwise improper.

A foundation must be laid for documentary evidence and such evidence must be authenticated by the custodian of the record or by a witness who can testify that the document is genuine. Documentary evidence should be marked for identification and the exhibit number referred to whenever the document is mentioned.

Expert opinions may be admitted in administrative proceedings. Before the date of the hearing, all parties should exchange the names, addresses, and qualifications of any expert that may testify. It is within the Hearing Officer's discretion to qualify an expert and determine the weight afforded to expert opinions. Hearing Officers are not bound by expert opinions presented to them, and it is up to the Hearing Officer to weigh the credibility of expert testimonies and at times must resolve conflicts between expert testimonies. By statute, in civil cases, no expert or lay witness shall be prohibited from expressing an opinion on the ultimate issue of fact.⁴⁸ However, this section prohibits such witnesses from expressing any opinion which constitutes a conclusion of law.

DEQ should arrange for a court reporter to attend the hearing and produce a transcript of the hearing.

Post-Hearing Issues

Time Restrictions on Rendering Case Decisions

A Hearing Officer must issue a recommendation within 90 days from the date of the formal hearing, or from a later date agreed to by DEQ and the named party.⁴⁹ In cases in which a Hearing Officer presided over the hearing, DEQ or the board must issue a decision within 30 days from receipt of the Hearing Officer's recommendation. If the agency does not make a decision within that 30 day period, the party may notify the agency in writing that a decision is due.⁵⁰ If the agency does not make the decision within 30 days of receiving the notice, the decision is deemed in favor of the named party, precluding DEQ from ordering penalties or injunctive relief, or issue a case decision finding the Responsible Party in violation of legal requirements in the case.⁵¹ Provisions are made in the APA for situations where the agency personnel who conducted the informal proceeding are unable to attend to official duties due to sickness, disability, or termination of their official capacity with the agency.

⁴⁷ *Virginia Real Estate Comm'n v. Bias*, 226 Va. 264, 270, 308 S.E. 2d 123, 126 (1983).

⁴⁸ Va. Code § 8.01-401.3(B).

⁴⁹ Va. Code § 2.2-4024(D)(2).

⁵⁰ Va. Code § 2.2-4021.

⁵¹ This provision does not apply to case decisions before the State Water Control Board or DEQ to the extent necessary to comply with the federal Clean Water Act, the State Air Pollution Control Board or DEQ to the extent necessary to comply with the federal Clean Air Act, or the Virginia Soil and Water Conservation Board or the Department of Conservation and Recreation to the extent necessary to comply with the federal Clean Water Act.

In a formal hearing before a quorum of the State Water Control Board, the Board must issue a decision within 90 days from the hearing date, or a later date agreed by the parties. If no decision is made within that period, the named party may notify the agency that a decision is due. If no decision is made within 30 days from receipt of the notice, the decision shall be deemed in favor of the named party.⁵²

Proposed Findings of Fact and Conclusions of Law

The APA provides that the parties may submit proposed findings and conclusions and statements of reasons therefor.⁵³ The Agency Advocate prepares the proposed findings of fact and conclusions of law on behalf of DEQ.

The parties may also file other documents with the Hearing Officer, including corrections to the transcript, and memorandum of law in support of proposed conclusions of law. The parties are encouraged to submit their findings in and electronic format unless hard copies are requested by the Hearing Officer.

The Hearing Officer determines the date such filings are due, which is usually done at the conclusion of the formal hearing.

Hearing Officer's Recommendation

The Hearing Officer's recommendation should include findings of fact and conclusions of law on all material issues of fact and law presented on the record, including specific citations to the applicable portions of the record. The findings of fact should be linked to the testimony and other evidence in the record and give a basis for the conclusion drawn. The hearing officer must submit a recommendation within the statutory timeframe (90 days from the date of the formal hearing), unless otherwise agreed by DEQ and the named party.

The Hearing Officer should submit the recommendation to DEQ electronically, copying the named party, and deliver the record as directed by the agency.

Default

If the named Party fails to attend the Hearing without good cause, the default provisions of Va. Code § 2.2-4020.2 apply, as described in Part I.B.3.d. above.

Exceptions to Hearing Officer Recommendation

Pursuant to Va. Code § 2.2-4020, "Where hearing officers or subordinate presiding officers, as the case may be, make recommendations, the agency shall receive and act on exceptions thereto." Upon receipt of the Hearing Officer's recommendation, DEQ's Agency Advocate will notify all

⁵² This provision does not apply to case decisions before the State Water Control Board or DEQ to the extent necessary to comply with the federal Clean Water Act, the State Air Pollution Control Board or DEQ to the extent necessary to comply with the federal Clean Air Act, or the Virginia Soil and Water Conservation Board or the Department of Conservation and Recreation to the extent necessary to comply with the federal Clean Water Act.

⁵³ Va. Code § 2.2-4020(D).

parties in writing that any written exceptions to the Hearing Officer's recommendation should be filed within fourteen days of receipt of the notice that exceptions are due, or such other time as stated therein. If the Hearing Officer's recommendation, or components thereof, are contrary to DEQ's position(s) in the case, the Agency Advocate may submit exceptions on behalf of DEQ.

Participants' Opportunity to Respond to Summaries at Board Meeting

When a Citizens' Board will be meeting to render a decision, and considering information from a prior hearing, whether conducted by a hearing officer or the Board itself, any person who participated in the prior proceeding must be provided an opportunity to respond at the Board meeting to any summaries of the prior proceeding prepared by or for the Board.

Agency Case Decision

A case decision issued after a formal hearing must "briefly state . . . the findings, conclusions, reasons, or basis therefor upon the evidence presented by the record and relevant to the basic law under which the agency is operating together with the appropriate order, license, grant of benefits, sanction, relief, or denial thereof."⁵⁴ In the final agency decision, the decision maker may approve, disapprove, or modify the recommendations of the Hearing Officer. Where appropriate the decision maker may adopt the Findings of Fact and Conclusions of Law recommended by the Hearing Officer or may incorporate exceptions filed by DEQ or the named party. The final decision will be issued by the Director of DEQ, the Director's designee, or the applicable Board and will include:

- An order as to the final disposition of the case, including relief (injunctive relief and/or penalty ordered), if appropriate;
- The legal authority for the agency action
- A recitation of the procedural events leading to the informal proceeding.
- The factual basis for the decision, including any statements as to the credibility of witnesses.
- The conclusion as to what violations if any, have occurred, and any other conclusion of law.
- Signature of the ultimate decision maker.
- The date upon which the decision will become effective;

Service of the Case Decision

The APA requires DEQ to serve copies of all case decisions and orders on the parties by mail within five days of the decision.⁵⁵

Va. Code §§ 10.1-1309; 10.1-1455(G); and 62.1-44.15(8b) and 62.1-44.12 include specific requirements for service of special orders issued after formal hearings, and tie the effective date of the orders to the date of service:

⁵⁴ Va. Code § 2.2-4020(E).

⁵⁵ Va. Code §§ 2.2-4021 and 2.2-4023.

- A water special order, must be served on the Responsible Party by certified mail sent to their last known address, and the special order takes effect not less than 15 days after mailing.⁵⁶
- A waste special order must be delivered to the responsible party or mailed by certified mail to their last known address, and the special order becomes effective five days after delivery or mailing.
- An air special order must be served on the Responsible Party by certified mail, return receipt requested, sent to their last known address, or by personal delivery by an agent of the Board; the special order takes effect not less than five days after receipt by the responsible party.

The transmittal letter for the case decision should notify the named party of their right to appeal pursuant to § 2.2- 4026 and Rule 2A:2 of the Rules of the Virginia Supreme Court as described in Part I.B.3.f above.

Reconsideration of Formal Hearings

When DEQ or a citizen's board issues a final decision after a formal hearing, a party may file a petition for reconsideration within 15 days from service of the decision. The petition must include a full and clear statement of pertinent facts, grounds for reconsideration, and a statement of relief. The petition does not suspend the execution of the decision or toll the time for filing an appeal, unless the agency grants the petition and provides for suspension of the decision.

In considering a petition for reconsideration, DEQ may consider:

- Evidence in the administrative record;
- New material evidence that was not in existence before the administrative record closed;
- Newly discovered material evidence that could not, with reasonable diligence, have been discovered and produced before the administrative record closed.

DEQ must issue a written decision on a petition for reconsideration of a DEQ decision within 30 days of receipt. A citizens' board may consider a petition for reconsideration of the board's decision at the next regularly scheduled board meeting; schedule a special meeting to decide upon the petition within 30 days of receipt; or delegate to the DEQ director, the board chairman, or a board subcommittee the authority to issue a decision within 30 days of receipt by the board.

The agency must state the reasons for its decision on a petition for reconsideration, and the written decision must:

- 1) Deny the petition,⁵⁷
- 2) Modify the case decision, or
- 3) Vacate the case decision and set a new hearing for further proceedings.

⁵⁶ Va. Code §§ 62.1-44.15(8b) and 62.1-44.12.

⁵⁷ Denial of a petition for reconsideration is not a separate case decision and is not subject to judicial review on its own merits.

DEQ may modify the case decision or vacate the case decision and set a new hearing for further proceedings on the basis of:

- 1) Error on the face of the decision;
- 2) Clear error of fact;
- 3) New material evidence that was not in existence before the administrative record closed; or newly discovered material evidence that could not, with reasonable diligence, have been discovered and produced before the administrative record closed;
- 4) Issuance of a decision contrary to law; or
- 5) Failure to conduct the hearing in accordance with Va. Code § 2.2-4020.

In addition to responding to petitions for reconsideration, DEQ or a citizens' board may also act on its own initiative to reconsider final decisions within 30 days of issuance. If DEQ staff identifies an error of the type listed above in a decision issued by DEQ or a citizens' board following a formal hearing, they should notify the Director of Enforcement, Enforcement Adjudication Manager, and signatory of the decision to discuss whether reconsideration is warranted.